IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.: 510 of 2000.

Reserved on: 20.4.2007.

Decided on: 18.05. 2007.

Mehar Singh Manhas

… … … Petitioner.

Versus

Union of India & Others.

… … … Respondents.

Coram:

The Hon'ble Mr. Justice Rajiv Sharma, J.

Whether approved for reporting?[1] *Yes.*

For the petitioner: **Mr. K.D. Sood, Advocate.**

For the Respondents: **Mr. Kulbhushan Khajuria, Central Govt. Counsel.**

Rajiv Sharma, Judge:

The present petition has been filed against Annexures P-3, P-5 and P-8, dated 14.7.1998, 14.3.2000 and 2.6.1999, respectively.

The brief facts necessary for adjudication of this petition are that the petitioner was recruited as Sepoy in the Indian Army on 8.4.1980. Initially, the petitioner was recruited in the Punjab Regiment, but subsequently he was shifted to Intelligence Corps.

Whether reporters of local papers may be allowed to see the judgment? Yes.

He was promoted to the rank of Naik on 1.1.1988 and was subsequently promoted to the rank of Havaldar on 1.1.1991. The petitioner was posted to Field Security Company, 8, Mountain Division with effect from 14.1.1997. He was sent to perform his duties with 53 Infantry Brigade. The petitioner was charged under Section 41(1) of the Army Act, 1950 for the alleged misconduct as reproduced below:-

> **"He at field, on 01 June, 98, when ordered by IC-41475Y Maj NK Airy BM HQ 53 Inf Bde not to proceed on any operation since there were orders from HQ 28 Inf Div to this effect to which he replied that "Main yahan par roti todne ke liye nahi hun aur mein to operation par jaunga" words to that effect and proceeded for the operation."**

Subsequently, summary of evidence was directed to be recorded against the petitioner on 10.7.1998. Copy of the same has been placed on record by the petitioner vide Annexure P-1. Thereafter the directions were issued for trying the petitioner by Summary Court Martial on a convening report on 13.7.1998 (Annexure P-2). The petitioner was reduced to ranks vide Annexure P-3. The expression used in Annexure P-3, dated 14.7.1998 is as under: -

'To be reduced to the ranks'

Feeling aggrieved by the imposition of penalty of reduction to the ranks, the petitioner filed petition/appeal on 10th December, 1998. The appeal preferred by the petitioner was not decided which led to the filing of reminder by the petitioner on 13th

October, 1999 vide Annexure P-4. The appeal preferred by the petitioner was rejected by the Chief of the Army Staff vide Annexure P-5 on 14th March, 2000. The petitioner was discharged from the Army on 2nd June, 1999 before the decision of his appeal vide Annexure P-8.

I have perused the entire record carefully and heard the parties.

Mr. Kapil Dev Sood has submitted that the recording of the summary of evidence as well as constitution of the Summary Court Martial was not in accordance with the Army Act, 1950 and the Rules framed thereunder. Mr. Kulbhushan Khajuria appearing on behalf of the respondents has supported the orders passed against the petitioner. Mr. Kapil Dev Sood has drawn the attention of this Court to page 37 wherein the following answer has been given by the petitioner: -

> **"No. However, I wish to beg forgiveness and am sorry."**

Mr. Sood has submitted that though the petitioner pleaded guilty, but it was conditional. Mr. Sood alternatively prays that even if the petitioner has admitted his guilty, the penalty of reduction to ranks imposed on the petitioner was disproportionate to the alleged mis-conduct. Mr. Sood submitted that what the petitioner has told as per the summary of evidence and the proceedings of the Summary Court Martial is that ***"Main yahan par roti todne ke liye nahi hun aur main to operation par jaunga"*.** Mr. Sood states that the words used in italics reflect

that the petitioner was a sincere and disciplined soldier and he wanted to go for the operation in militancy infested area. These words by the petitioner could not be used to initiate proceedings against him under Section 41 (1) of the Army Act, 1950.

I am of the view that if the words used in italics are seen in totality with his reply at page 37, it will not constitute a mis-conduct which could result into reduction of ranks on 14.7.1998. The petitioner has also given his explanation for using these words in his appeal on 13th October, 1999. The Chief of the Army Staff has not taken into consideration the grounds taken by the petitioner in his appeal. It was incumbent upon the Chief of the Army Staff to take into consideration all the grounds mentioned in the appeal and thereafter to pass the reasoned order. The appellate order is not a speaking order and is liable to be quashed and set aside.

The Hon'ble Supreme Court in **Narinder Mohan Arya versus United India Insurance Co. Ltd. and Others, (2006) 4 SCC 713** has held that the appellate order must contain reasons so as to enable the writ Court to ascertain whether there was application of mind to the points required by the relevant rules. Their Lordships of the Hon'ble Supreme Court have held:-

> **"The order of the Appellate Authority demonstrates total non-application of mind. The Appellate Authority, when the Rules require application of mind on several factors and serious contentions have been raised, was bound to assign reasons so as to enable the writ court to ascertain as to whether he had applied**

his mind to the relevant factors which the statute requires him to do. The expression "consider" is of some significance. In the context of the Rules, the Appellate Authority was required to see as to whether (i) the procedure laid down in the Rules was complied with; (ii) the enquiry officer was justified in arriving at the finding that the delinquent officer was guilty of the misconduct alleged against him; and (iii) whether penalty imposed by the disciplinary authority was excessive."

The Hon'ble Supreme Court has pronounced the law in the following cases with regard to the interference by the Court in the punishments awarded by the disciplinary authorities:-

The Hon'ble Supreme Court in ***Chandra Vilash Rai Vs. State of Bihar and others (2003) 11 SCC 741*** while taking into consideration the long service of more than 20 years rendered by the delinquent have altered the punishment to one of the pre-mature retirement. The Hon'ble Supreme Court has held as under:

"Having examined the charges alleged and proved against the two delinquents, we cannot but observe that the charges are serious, more particularly, since they relate to affairs of a cooperative bank. But at the same time, it cannot be disputed that these delinquents have rendered services in the Society for more than 20 years. It also transpires that the so-called delinquency had not been committed on their own but at the behest of the Board of Directors, though in law such action would not exonerate the delinquents from

the liabilities which they would incur for such illegalities and irregularities. In the aforesaid premises, we think it appropriate that ends of justice will be met if we alter the punishment of dismissal to one of premature retirement, as provided in the Staff Regulations of the Bank, which appear to have been framed by the Board in its resolution dated 12.3.1985 which punishment also is a major punishment and we accordingly so direct. If the delinquents are entitled to any retirement benefits on the basis of such premature retirement, those may be given to them. These appeals are disposed of accordingly."

The Hon'ble Supreme Court has held in ***Dev Singh V. Punjab Tourism Development Corporation and another, (2003) 8 SCC 9*** that if the punishment imposed by disciplinary authority shocks judicial conscience, court can mould the relief. The Hon'ble Supreme Court has held as under:

"A perusal of the above judgments clearly shows that a court sitting in appeal against a punishment imposed in the disciplinary proceedings will not normally substitute its own conclusion on penalty, however, if the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the court, then the court would appropriately mould the relief either by directing the disciplinary/appropriate authority to reconsider the penalty imposed or to shorten the litigation it may make an exception in rare cases and impose appropriate punishment with cogent reasons in support thereof. It is also clear from the above noted judgments of this Court, if the punishment

imposed by the disciplinary authority' is totally disproportionate to the misconduct proved against the delinquent officer, then the court would interfere in such a case.

Applying the said principles laid down by this Court in the cases noted hereinabove, we see that in this case the appellant has been serving the respondent Corporation for nearly 20 years with unblemished service, before the present charge of misconduct was levelled against him. The charge itself shows that what was alleged against the appellant was misplacement of a file and there is no allegation whatsoever that this file was either misplaced by the appellant deliberately or for any collateral consideration. A reading of the charge-sheet shows that the misplacement alleged was not motivated by any ulterior consideration and at the most could be an act of negligence, consequent to which the appellant was unable to trace the file again. The disciplinary authority while considering the quantum of punishment came to the conclusion that the misconduct of the nature alleged against the appellant should be viewed very seriously to prevent such actions in future, whereby important and sensitive records could be lost or removed or destroyed by the employee under whose custody the records are kept. Therefore, he was of the opinion that a deterrent punishment was called for, forgetting for a moment that no such allegation of misplacing of important or sensitive record was made in the instant case against the appellant and what he was charged of was misplacement of a file, importance or sensitiveness of which was not mentioned in the charge-sheet. Therefore, in our opinion, the

disciplinary authority was guided by certain facts which were not on record, even otherwise, we are of the opinion that when the Service Bye-laws applicable to the Corporation under Service Bye-law 17 provide various minor punishments, we fail to appreciate why only maximum punishment available under the said Bye-laws should be awarded on the facts of the present case. We think the punishment of dismissal for mere misplacement of a file without any ulterior motive is too harsh a punishment which is totally disproportionate to the misconduct alleged and the same certainly shocks our judicial conscience. Hence, having considered the basis on which the punishment of dismissal was imposed on the appellant and the facts and circumstances of this case, we think to avoid further prolonged litigation it would be appropriate if we modify the punishment ourselves. On the said basis, while upholding the finding of misconduct against the appellant, we think it appropriate that the appellant be imposed a punishment of withholding of one increment including stoppage at the efficiency bar in substitution of the punishment of dismissal awarded by the disciplinary authority. We further direct that the appellant will not be entitled to any back wages for the period of suspension. However, he will be entitled to the subsistence allowance payable up to the date of the dismissal order."

The Hon'ble Supreme Court has held in ***Director General, RPF and others Vs. Ch. Sai Babu, (2004) 4 SCC 331*** as under:

Normally, the punishment imposed by a disciplinary authority should be disturbed by the High Court or a tribunal except in appropriate

cases that too only after reaching a conclusion that the punishment imposed is grossly or shockingly disproportionate, after examining all the relevant factors including the nature of charges proved against, the past conduct, penalty imposed earlier, the nature of duties assigned having due regard to their sensitiveness, exactness expected of and discipline required to be maintained, and the department/establishment in which the delinquent person concerned works."

In a recent judgment, the Hon'ble Supreme Court in ***Management of Coimbatore District Central Cooperative Bank Vs. Secretary, Coimbatore District Central Cooperative Bank Employees Association & another, 2007 (6) Scale 45*** with regard to doctrine of proportionality has held as under:

"So far as the doctrine of proportionality is concerned, there is no gainsaying that the said doctrine has not only arrived at in our legal system but has come to stay. With the rapid growth of Administrative Law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by Courts. If an action taken by any authority is contrary to law, improper, unreasonable, irrational or otherwise unreasonable, a Court of Law can interfere with such action by exercising power of judicial review. One of such modes of exercising power, known to law is the 'doctrine of proportionality'

'Proportionality' is a principle where the Court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a

decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise -the elaboration of a rule of permissible priorities.

de Smith states that 'proportionality' involves 'balancing test' and 'necessity test'. Whereas the former ('balancing test') permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the latter ('necessity test') requires infringement of human rights to the least restrictive alternative. ['Judicial Review of Administrative Action '; (1995); pp. 601-605; para 13.085; see also Wade & Forsyth; 'Administrative Law '; (2005); p.366].

In Halsbury's Laws of England, (4th edn.); Reissue, Vol.1(1); pp.144-45; para 78, it is stated;

"The court will quash exercise of discretionary powers in which there is no reasonable relationship between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct. The principle of proportionality is well established in European law, and will be applied by English courts where European law is enforceable in the domestic courts. The principle of proportionality is still at a stage of development in English law; lack of proportionality is not usually treated as a separate ground for review in English law, but is regarded as one indication of manifest unreasonableness."

The doctrine has its genesis in the field of Administrative Law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without abuse of discretion. There can be no 'pick and choose', selective applicability of Government norms or unfairness, arbitrariness or unreasonableness. It is not permissible to use a 'sledge-hammer to crack a nut'. As has been said many a time; "Where paring knife suffices, battle axe is precluded".

In the celebrated decision of Council of Civil Service Union (CCSU) v. Minister for Civil Service, (1984) 3 All ER 935: (1984) 3 WLR 1174: (1985) AC 374 (HL), Lord Diplock proclaimed;

"Judicial review as I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. This is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of proportionality '... " (emphasis supplied)

CCSU has been reiterated by English Courts in several subsequent cases. We do not think it necessary to refer to all those cases.

So far as our legal system is concerned, the doctrine is well-settled. Even prior to CCSU; this Court has held that if punishment imposed on an

employee by an employer is grossly excessive, disproportionately high or unduly harsh, it cannot claim immunity from judicial scrutiny, and it is always open to a Court to interfere with such penalty in appropriate cases.

In Hind Construction Co. v. Workmen, (1965) 2 SCR 85: AIR 1965 SC 917, some workers remained absent from duty treating a particular day as holiday. They were dismissed from service. The Industrial Tribunal set aside the action. This Court held that the absence could have been treated as leave without pay. The workmen might have been warned and fined. (But) "It is impossible to think that any reasonable employer would have imposed the extreme punishment of dismissal on its entire permanent staff in this manner." The Court concluded that the punishment imposed on the workmen was not only severe and out of proportion to the fault, but one which, in our judgment, no reasonable employer would have imposed. (emphasis supplied)

In Indian Chamber of Commerce v. Workmen, (1972) 1 SCC 40 : AIR 1972 SC 763, the allegation against the employee of the Federation was that he issued legal notices to the Federation and to the International Chamber of Commerce which brought discredit to the Federation –the employer. Domestic inquiry was held against the employee and his services were terminated. The punishment was held to be disproportionate to the misconduct alleged arid established. This Court observed that "the Federation had made mountain out of a mole hill and made a trivial matter into one involving loss of its prestige and reputation.

In Ranjit Thakur referred to earlier, an army officer did not obey the lawful command of his superior officer by not eating food offered to him .Court Martial proceedings were initiated and a sentence of rigorous imprisonment of one year was imposed. He was also dismissed from service, with added disqualification that he would be unfit for future employment.

Applying the doctrine of proportionality and following CCSU; Venkatachaliah, J. (as His Lordship then was) observed:

"The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court-martial if the decision of the court even as to sentence is an outrageous defence logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review. " (Emphasis supplied)

From the above decisions, it is clear that our legal system also has accepted doctrine of proportionality. The question however, is whether in the facts and circumstances of the present case, the High Court was justified in invoking and applying the doctrine of proportionality. In our judgment the answer must be in the negative. Normal when disciplinary proceedings have been

initiated and finding of fact has been recorded in such inquiry, it cannot be interfered with unless such finding is based on 'no evidence or is perverse, or is such that no reasonable man in the circumstances of the case would have reached such finding. In the present case, four charges had been levelled against the workmen. An inquiry was instituted and findings recorded that all the four charges were proved. The Labour Court considered .the grievances of the workmen, negatived all the contentions raised by them, held the inquiry to be in consonance with principles of natural justice and findings supported evidence. Keeping in view the charges proved, the Labour Court, in our opinion rightly held that the punishment imposed on workmen could not be said to be harsh so as to interfere with it."

In the present case, this Court is of the view that the admission made by the petitioner during the course of Summary Court Martial was conditional to minimize the sentence. The words uttered by the petitioner as stated above in Hindi will not amount to violation of Section 41 (1) of the Army Act, 1950. The petitioner at the most on the basis of the uttering of the words by him could be reprimanded and to be more careful in future. The petitioner has only shown his keenness to go for the said operation, meaning thereby that he was over enthusiastic to discharge his duties in a terrorist infested area. An Army personnel could be said to have disobeyed the orders if he refuses to go out for the operation. In the present case, it will not amount to defiance of the order if the petitioner was keen to go

out for operation, risking his life. The imposition of reduction to ranks on 14.7.1998 is disproportionate to the alleged misconduct. The imposition of penalty of reduction to ranks upon the petitioner was arbitrary, unreasonable and has also pricked the conscience of this Court. Thus, in view of the law pronounced by their Lordships of the Hon'ble Supreme Court in the above cited cases, I am of the view that the penalty of reduction to ranks imposed upon the petitioner is liable to be quashed and set aside being disproportionate.

Accordingly, this petition is allowed. The order of reduction to ranks dated 14.7.1998 (Annexure P-3) is quashed and set aside. Similarly, the appellate order dated 14th March, 2000 (Annexure P-5) is also quashed and set aside being a non-speaking order. The petitioner is held entitled to all the consequential benefits.

(Rajiv Sharma)
Judge

May 18, 2007
(sck).